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Attorneys for Defendant, ALEXANDER SMIRNOV

8  
9 UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

10 \* \* \* \* \*

11  
12 UNITED STATES OF AMERICA, ) CASE NO. 2:24-CR-00091-ODW

13 Plaintiff, )

)  
) **DEFENDANT'S NOTICE OF**  
) **MOTION AND MOTION TO**  
) **COMPEL PRODUCTION OF**  
) **DISCOVERY**

14  
15 v. )

16 ALEXANDER SMIRNOV, )

) **Honorable Otis D. Wright II**  
) **November 18, 2024, at 10:00 a.m.**

17 Defendant, )  
18 )  
19 )

20 **PLEASE TAKE NOTICE** that on November 18, 2024, at 10:00 am, or as  
21 soon thereafter as counsel may be heard, Defendant, ALEXANDER SMIRNOV  
22 ("Mr. Smirnov"), by and through his attorneys, DAVID Z. CHESNOFF, ESQ., and  
23 RICHARD A. SCHONFELD, ESQ., of the law firm of CHESNOFF &  
24 SCHONFELD, will ask this Honorable Court to enter an order granting his Motion  
25 to Compel Production of Discovery.  
26

1 Specifically, Defendant, Mr. Smirnov hereby moves this Honorable Court  
2 to enter an Order granting the Defendant's Motion and compelling the  
3 government's complete response (within five (5) days) to the requests stated in that  
4 Motion.  
5

6 This Motion is made and based upon the attached Memorandum of Points  
7 and Authorities; the Exhibits to that Motion; any argument of counsel; and any  
8 other such evidence as may be presented.  
9

10 Counsel for the Defendant has communicated with Assistant United States  
11 Attorney, Mr. Leo Wise, in regard to the discovery dispute, and the specific  
12 requests for discovery. Counsel Wise has responded that "We have and will  
13 continue to comply with our discovery obligations pursuant to Federal Rule of  
14 Criminal Procedure 16, 18 U.S.C. Section 3500 (the "Jencks Act"), Federal Rule  
15 of Criminal Procedure 5(f) (*see* ECF No. 43) and Brady, Giglio and related cases.  
16 In addition to making appropriate discovery requests, your letters ask for  
17 documents and other materials that are outside that body of law. As to that  
18 information and materials, we decline to produce it."  
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1 Accordingly, the issues raised by this Motion to Compel Production of  
2 Discovery were not resolved.

3 Dated this 16th day of October 2024.

4  
5 CHESNOFF & SCHONFELD

6 /s/ David Z. Chesnoff

7 DAVID Z. CHESNOFF, ESQ.

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16 Attorneys for ALEXANDER SMIRNOV  
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**MEMORANDUM OF POINTS AND AUTHORITITES**

**I. BACKGROUND**

**A. Indictment and Production of Discovery to Date**

Mr. Smirnov is charged by a two-count Indictment with: 1) Making False Statements to a Government Agent, in violation of 18 U.S.C. § 1001; and 2) Falsification of Records in a Federal Investigation, in violation of 18 U.S.C. § 1519. *See* Dkt. 1 (Feb. 14, 2024).

As noted in prior motions, Mr. Smirnov served as a confidential human source (“CHS”) for the FBI for over 10 years. While the Government has produced voluminous discovery, Mr. Smirnov has made three separate written requests for discovery, with many discovery requests outstanding.

As a result, Mr. Smirnov brings this Motion.<sup>1</sup>

**B. Mr. Smirnov’s Discovery Requests**

On September 27, 2024, in a letter to government counsel, the defense team stated as follows, in pertinent part:

*[W]e have previously sent three letters (dated March 5, May 28, and August 28, 2024) requesting certain specific discovery in addition to (or, as part of) the government’s discovery obligations under Rule 16, Jencks, Brady, and Giglio, among others. Our comparison between our letters and the discovery that the government has produced to date reveals that we have not received complete (or, any) discovery, as follows:*

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<sup>1</sup> As of time of this filing, Mr. Smirnov’s *Ex Parte* Application to Continue Trial (ECF No. 131, Sept. 26, 2024) remains pending.

I. March 5 letter (no discovery in response to request, by paragraph)

- ¶7 [No discovery.]
- ¶10 [We assume your response only includes [REDACTED], in which case we have received nothing in response to subparagraphs (a) through (h). We are in receipt of a recorded interview, reports of interviews, grand jury testimony, grand jury subpoena, photographs of messages between him and AS, and photos of passport.]
- ¶12 [We do not see this assessment.]
- ¶23 [We do not see any communication from the FBI's Pitt.]
- ¶37 [We see no response from Mr. Weiss' team.]

In addition to the foregoing, the government's response raises the following issues regarding our March 5 letter:

- ¶19 [Some responsive discovery was provided in government production no. 1 (with [REDACTED] travel summary), but we do not have any records of compensation, cooperation benefits, or equivalent items, pertaining to the government's witnesses.]
- ¶¶24–27 [The only item that appears responsive regarding communications between AS and Associate 2 are some emails, texts, and travel records; none of these, however, appear to relate to interaction with Burisma officials.]
- ¶38 [We received the CHS reporting document in government production no. 1, but there appears to be more communication on this topic that has not been produced.]

II. May 28 Letter

- **[NOTHING FURTHER IS NEEDED.]**

1           III.    August 28 Letter

- 2           •       We have not, since our specific August 28, 2024  
3           request, received any discovery related to Hunter  
4           Biden's or Mr. Smirnov's work or interaction with  
5           Burisma. This request included but was not limited to  
6           State Department released information that was  
            provided to the New York Times and a letter that was  
            evidently sent by Hunter Biden to the Italian Embassy.

7           Second, we need to confirm that the government has provided us with  
8           all discovery documenting any contact or communication between  
9           Mr. Smirnov and his handler. In particular, we have not received any  
10          evidence from this category of discovery reflecting Smirnov-Handler  
11          communications dating from before 2016. We thus request discovery  
            evidence any and all such contacts or communications, from any date.

12          Third, should the government possess, but decline to produce, any  
13          discoverable evidence of any sort (including, but not limited to pre-  
14          2016 communications), we request that you 1) state your position in  
            writing, and 2) set forth the basis of the refusal to produce it.

15          Finally, the CIPA restrictions in this case 1) have limited defense  
16          counsel, to date, to only one authorized viewing (in the Secure Unit in  
17          Los Angeles) of that discovery, and 2) necessarily preclude any  
18          substantive discussion in this letter of any viewed CIPA-discovery.  
19          Should you believe that any restricted CIPA-discovery is responsive  
20          to any of the items identified in this letter, please notify me about that  
21          fact only (with nothing substantive), so that the parties and security  
22          officers can agree on a mutually acceptable way to further Mr.  
            Smirnov's effective trial preparation without compromising any  
            aspect of the statutory CIPA restrictions, the Protective Order, or the  
            government's interest in confidentiality.

1 Letter from Richard A. Schonfeld, Esq. to Leo J. Wise, DOJ Principal  
2 Special Assistant Senior Counsel (Sep. 27, 2024) (attached as Exhibit 1)  
3 (italics supplied).<sup>2</sup>  
4

5 In addition to the September 27, 2024 letter, Mr. Smirnov notes the  
6 following:

- 7 ● The government's responses to the May 28, 2024 letter are  
8 complete.
- 9 ● To clarify the September 27 request regarding communications  
10 between Mr. Smirnov ("AS") and his handler: We do not have  
11 any such communications dating from *before* April 30, 2016,  
12 which is the date of the first "whatsapp" communication  
13 between the two. Additionally, we have no communications  
14 between AS or *anyone* before 2016. We reassert that the  
15 government must produce any and all communication to or  
16 from AS dating from before 2016, as such communications  
17 may be discoverable under *Brady*, *Giglio*, and/or Rule 16.
- 18 ● The government has not provided complete photos of AS's full  
19 USA passport book: passport # [REDACTED]; issued: 2015;  
20 expires: 2025.
- 21 ● The government must also produce all the electronic media  
22 (that is, photos and videos) created before 2016.
- 23 ● As detailed in email communications between defense counsel  
24 and counsel for the government, Mr. Chesnoff requested (on  
25 September 26, 2024) that the government return Mr. Smirnov's  
cell phone: the defense requires that phone (which had been  
upon Mr. Smirnov's arrest) in order to be able to retrieve and  
review all the data stored on it. In response, government  
counsel (on September 30, 2024) declined, stating: "We can't

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26 <sup>2</sup> Mr. Smirnov's three prior letters to the government (dated March 5, May 28, and  
August 28, 2024) are attached as Exhibits 2, 3 and 4, respectively.

1 release the phone. It's a piece of evidence that needs to be  
2 maintained by the FBI until the conclusion of the case."  
3 Defense counsel replied (also on September 30) that "[w]e can  
4 easily stipulate to the chain of custody on that specific item,"  
5 and that "review [of] the actual phone" would save the defense  
6 a "very measurable amount of time." Government counsel  
7 again refused, stating on October 1: "Stipulating to chain-of-  
8 custody doesn't address the issue. The FBI needs to keep the  
9 device in order to maintain the integrity of the data on it."

10 Mr. Smirnov reasserts that he requires the physical phone to  
11 provide dates, times and context for the videos and voice  
12 messages exchanged with his handler.

- 13 • Positive independent photographic identification of the FBI  
14 handler for Mr. Smirnov. Such photographic identification is  
15 needed (among other reasons) for Mr. Smirnov to be able to  
16 identify his handler in Mr. Smirnov's photos and to document  
17 the course of dealings, travel, and relationship between the two.
- 18 • During the course of his work on behalf of the FBI, Mr.  
19 Smirnov met with Associate 1, who introduced certain third  
20 parties to Mr. Smirnov. Mr. Smirnov, in turn, reported those  
21 persons to his FBI handler, which then (on information and  
22 belief) opened official investigations into those third parties.  
23 Mr. Smirnov demands full and complete information regarding  
24 those third parties identified by Associate 1, including their full  
25 names, contact information, aliases (if any), and the complete  
26 contents of any official files or investigations (by the FBI or  
any other government entity) concerning such third parties.

21 **C. The Government Refuses Even to Countenance Mr. Smirnov's**  
22 **Requests**

23 In its response, the government stated in pertinent part:

24 *We have and will continue to comply with our discovery obligations*  
25 *pursuant to Federal Rule of Criminal Procedure 16, 18 U.S.C.*  
26



1 *Section 3500 (the “Jencks Act”), Federal Rule of Criminal Procedure*  
2 *5(f) (see ECF No. 43) and Brady, Giglio and related cases.*

3 *In addition to making appropriate discovery requests, your letters ask*  
4 *for documents and other materials that are outside that body of law.*  
5 *As to that information and materials, we decline to produce it.*

6 Email from Leo J. Wise, DOJ Principal Special Assistant Senior Counsel to  
7 Richard A. Schonfeld, Esq. (Oct. 2, 2024) (attached as Exhibit 5) (italics supplied).

8 The government’s “response” to Mr. Smirnov can be succinctly summarized  
9 as a refusal to produce the documents. After a cursory, non-substantive “assurance”  
10 of compliance, the government flatly refuses: 1) to address, in any way, *any* of the  
11 specific defects associated with the March 5 letter; 2) to even *address* the request  
12 for critical information regarding all communications between Mr. Smirnov and  
13 his handler, much less “set forth the *basis*” for the government’s refusal to do so;  
14 and 3) to even *address* Mr. Smirnov’s CIPA-based concerns. As shown below, the  
15 government’s posture necessitates judicial intervention (something Mr. Smirnov  
16 had hoped to avoid, through informal letters and emails) and, more importantly,  
17 violates Mr. Smirnov’s constitutional and procedural rights.  
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## 21 **II. DISCUSSION**

### 22 **The Government’s Discovery Noncompliance—Manifesting in its Refusal to** 23 **Even Address Mr. Smirnov’s Concerns—Violates the Due Process Clause** 24 **and Compels Immediate Judicial Intervention**

25 The Fifth Amendment to the United States Constitution provides that “[n]o  
26 person shall be . . . deprived of life, liberty, or property, without due process of

1 law.” U.S. Const. Amend. V. The government has a constitutional duty to disclose,  
2 upon Mr. Smirnov request, all evidence favorable to him that is material to guilt or  
3 to punishment.

4  
5 In criminal prosecutions, the government must produce “evidence favorable  
6 to an accused . . . where the evidence is material either to guilt or to punishment,  
7 irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*,  
8 373 U.S. 83, 87 (1963). This obligation also includes evidence that can be used to  
9 impeach a government witness. *Giglio v. United States*, 405 U.S. 150, 154-55  
10 (1972). A prosecutor is presumed to know all information gathered by his office in  
11 connection with an investigation of the case. *Id.* Further, a prosecutor “has a *duty*  
12 *to learn of any favorable evidence* known to the others acting on the government's  
13 behalf in the case.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (emphasis added).

14  
15 Under *Brady*, the government must disclose favorable evidence that is  
16 “material” to the outcome of criminal proceeding. *Brady*, 373 U.S. at 87. “Material  
17 evidence” is that which leads to reasonable probability of producing a differing  
18 result or outcome. *Kyles*, 514 U.S. at 434.

19  
20 The Due Process Clause is violated when the prosecution fails to reveal any  
21 evidence that 1) it actually or constructively possesses, and 2) is favorable to the  
22 defendants and material to the issue of guilt or punishment or in any way discredits  
23 the government’s case. *Brady*, 373 U.S. at 87; *see also Miller v. Pate*, 386 U.S. 1  
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1 (1967); *Giles v. Maryland*, 386 U.S. 66 (1967). The prosecution must disclose  
2 material exculpatory evidence whether the defendant makes a specific request, a  
3 general request, or none at all. *See United States v. Agurs*, 427 U.S. 97 (1976).  
4

5 Due process necessitates that all *Brady/Giglio* material evidence be provided  
6 to Mr. Smirnov as soon as possible, and certainly as soon as it comes into the  
7 government's possession. *United States v. Mitchell*, 373 F. Supp. 1239, 1247  
8 (S.D.N.Y. 1973) ("We perceive the due process implications of *Brady* as obligating  
9 the government to disclose exculpatory information as soon as the character of  
10 such information is recognized. The obligation has no chronological boundaries,  
11 but applies equally to the pretrial, trial and posttrial stages of the proceeding." ).  
12  
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14 In this regard, the Supreme Court has stated: "Although there is, of course,  
15 no duty to provide defense counsel with unlimited discovery of everything known  
16 by the prosecutor the subject matter of such a request is material, or indeed if a  
17 substantial basis for claiming materiality exists, it is reasonable to require the  
18 prosecutor to respond either by furnishing the information or by submitting the  
19 problem to the trial judge. When the prosecutor received a specific and relevant  
20 request, the failure to make any response is seldom, if ever, excusable."  
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23 *Agurs*, 427 U.S. at 107, *holding modified by United States v. Bagley*, 473 U.S. 667  
24 (1985).  
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1        These principles require the government not only to *look* at Mr. Smirnov’s  
2        discovery requests, but to *comply* with them in good faith and then *provide* any  
3        responsive discovery. *But see* Ex. 5 (government asserts, without citation, that  
4        defendant’s letters seek discovery that falls “outside” what needs to be produced).  
5        Denial and suppression of any discovery that material to Mr. Smirnov’s defense  
6        (including any FBI reports) violates Mr. Smirnov’s constitutional right to a fair  
7        trial and due process. “If evidence highly probative of innocence is in [the  
8        government’s] files, [it] should be presumed to recognize its significance even if  
9        [it] has actually overlooked it.” *Giglio*, 405 U.S. at 154. Thus, precedent reaching  
10       back nearly a century emphasizes that Mr. Wise—as a prosecutor for the  
11       Department of Justice—is also a “servant of the law, the twofold aim of which is  
12       that guilt shall not escape or innocence suffer.” *Berger v. United States*, 295 U.S.  
13       78, 88 (1935).

14       Mr. Smirnov needs any and all nondisclosed evidence that is exculpatory,  
15       impeaching, or both. Thus, setting to one side the fact that Mr. Smirnov cannot  
16       possibly know *which* government reports remain undisclosed, reports reflecting  
17       Mr. Smirnov’s FBI handler’s accuracy and thoroughness (such as noting in a report  
18       what Mr. Smirnov actually told his handler, or where Mr. Smirnov said he was on  
19       a certain date) bears squarely on that handler’s credibility. The government’s  
20       refusal to produce the FBI reports authored by the government’s testifying  
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1 witnesses (including the handler) thus negates Mr. Smirnov's effective cross-  
2 examination and deprives the jury of the chance to make a "discriminating  
3 appraisal" of the witness's accuracy. *See, e.g., United States v. Roldan-Zapata*, 916  
4 F.2d 795, 806 (2d Cir. 1990) ("Cross-examination is *not* improperly curtailed if the  
5 jury is in possession of facts sufficient to make a 'discriminating appraisal' of the  
6 particular witness's credibility;" affirming conviction where district court did allow  
7 "extensive cross-examination" of testifying detective); *see also Delaware v. Van*  
8 *Arsdall*, 475 U.S. 673, 680 (1986) ("[A] criminal defendant states a violation of  
9 the Confrontation Clause by showing that he was prohibited from engaging in  
10 otherwise appropriate cross-examination designed to show a prototypical form of  
11 bias on the part of the witness, and thereby to expose to the jury the facts from  
12 which jurors . . . could appropriately draw inferences relating to the reliability of  
13 the witness.") (internal quotation omitted); *cf. United States v. Buske*, No. 09-CR-  
14 65, 2011 WL 2912707, at \*5 (E.D. Wis. July 18, 2011) ("Under *Brady* and *Giglio*,  
15 agent interview notes that materially vary from the reports will also be disclosed.").

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20 Other items specifically listed in the September 27, 2024 letter are likewise  
21 critical to Mr. Smirnov's defense. Regarding the specific request for all  
22 communications between Mr. Smirnov ("AS") and his handler, such  
23 communications fall within *Brady* and/or *Giglio* because Mr. Smirnov's course of  
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1 dealings between 2015 and 2016 are in question bear upon his claims regarding his  
2 alleged interactions with Ukrainian business officials during that time.

3       Regarding the incomplete contents of Mr. Smirnov's United States passport,  
4 any such items implicate *Brady* and/or *Giglio* because Mr. Smirnov's locations  
5 during 2015 and 2016 are crucial to his defense. Mr. Smirnov is a dual citizen of  
6 both Israel and the United States. He used both passports for his travels during the  
7 relevant time frame of this case. The defense discovered Mr. Smirnov's United  
8 States passport because Mr. Smirnov sent a photo of it to his handler on January  
9 10, 2018. The government provided Mr. Smirnov's full Israeli passport with  
10 stamps but failed to produce Mr. Smirnov's full United States passport with  
11 stamps.  
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14  
15       And, regarding the specific request for all media from before December  
16 2016, such media falls within *Brady* and/or *Giglio* because Mr. Smirnov's course  
17 of dealings between 2015 and 2016 are in question and because they pertain to Mr.  
18 Smirnov's claims and travels regarding his interactions with Ukrainian business  
19 officials during that time frame.  
20

21  
22       Finally, with regard to the information requested in our August 28 letter,  
23 complete disclosure of any evidence of contact between Burisma and Mr. Smirnov  
24 can be used for impeachment purposes: Mr. Smirnov must, among other things,  
25  
26

1 determine whether the government's allegations as to the timing of his first  
2 dealings with Burisma comport with his own recollection.

3 For the foregoing reasons, Mr. Smirnov requests the Court enter an order  
4 granting the Motion to Compel Production of Discovery.  
5

6 DATED this 16th day of October, 2024.  
7

8 Respectfully Submitted:

9 CHESNOFF & SCHONFELD  
10

11 /s/ David Z. Chesnoff

12 DAVID Z. CHESNOFF, ESQ.

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21 Attorneys for ALEXANDER SMIRNOV  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 16th day of October 2024, I caused the forgoing document to be served via the Court's e-filing/e-service system a true and correct copy of the foregoing to all parties listed on the Court's Service List.

/s/ Camie Linnell

Employee of Chesnoff & Schonfeld